IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

WILBERT C. JOHNSON #613845	§	
v.	§	CIVIL ACTION NO. 6:11cv446
JOHN RUPERT, ET AL.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Plaintiff Wilbert Johnson, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Johnson complaining of a policy implemented at the Michasel Unit in May of 2010, directing that inmates going to and coming from work at the packing plant be subjected to a strip search, including a procedure called "squat and cough." These strip searches were conducted with female officers in the vicinity. After an evidentiary hearing conducted pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), the Magistrate Judge issued a Report recommending that the lawsuit be dismissed as frivolous and for failure to state a claim upon which relief may be granted.

On January 11, 2012, Johnson filed a motion for extension of time in which to file objections to the Magistrate Judge's Report. This motion was granted on January 27, and Johnson was given until February 28, 2012, in which to file his objections. Johnson received a copy of this order on February 1, 2012, but has not filed any objections despite having ample time in which to do so; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions,

and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc)*.

After the evidentiary hearing, Johnson filed a motion for leave to amend his complaint, seeking to invoke the Fourth Amendment as well as to add a new claim that on or about October 20, 2011, female officers began ordering male inmates to strip, even when male guards were available to conduct the searches. The Fifth Circuit has held that Spears hearings are in the nature of amended complaints. Adams v. Hansen, 906 F.2d 192, 194 (5th Cir. 1990). The hearing thus gave Johnson the opportunity to amend his complaint, and he is not automatically entitled to another one. In Johnson v. Parks, 182 Fed.Appx. 300, 2006 WL 1308012 (5th Cir., May 10, 2006), the Fifth Circuit stated as follows:

> Johnson contends that the district court erred in ruling on his motion to amend his complaint. He had already amended his complaint through a hearing pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). Johnson has not established that the district court erred in denying Johnson's request to add allegations relating to an incident in November 2003. *See* Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995); Graves v. Hampton, 1 F.3d 315, 318-19 (5th Cir. 1993), *abrogated on other grounds by* Arvie v. Broussard, 42 F.3d 249, 251 (5th Cir. 1994).

Similarly, Johnson had the opportunity to amend his complaint at the hearing. Furthermore, his proposed amendment is futile. The Report of the Magistrate Judge, to which Johnson did not object, concluded that the strip searches were not unreasonable, a holding which encompasses Johnson's Fourth Amendment claim. Johnson did not allege that he had exhausted his administrative remedies on any claims involving female officers strip searching male inmates, nor did he allege that he personally had been strip searched in such a fashion. His request for leave to file an amended complaint lacks merit and does not present any basis upon which to set aside the Report of the Magistrate Judge.

The Court has carefully reviewed the pleadings and testimony in this cause, as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 16) is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled civil action be and hereby is DISMISSED with prejudice as frivolous and for failure to state a claim upon which relief may be granted. 28 U.S.C. §1915A. This dismissal does not implicate any claims of strip searches carried out by female officers on or after October 20, 2011, which claims are not part of this lawsuit. It is further

ORDERED that any and all motions which may be pending in this lawsuit, specifically including but not limited to the Plaintiff's motion for leave to amend (docket no. 18), are hereby DENIED. Finally, it is

ORDERED that the Clerk shall send a copy of this Memorandum Opinion to the Administrator of the Strikes List for the Eastern District of Texas.

So ORDERED and SIGNED this 9th day of April, 2012.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE